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EX PARTE

Electronic Filing via ECFS

January 22, 2007

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area* – WC Docket No. 04-223

In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage LEC Study Area – WC Docket No. 05-281

Dear Ms. Dortch:

Qwest hereby submits the attached *ex parte* for inclusion on the record in the above-referenced proceedings.

This submission is made pursuant to Sections 1.49(f) and 1.1206(b) of the rules of the Federal Communications Commission, 47 C.F.R. §§ 1.49(f), 1.1206(b).

Please contact me at 202.429.3120 if you have any questions.

Sincerely,

/s/ Melissa E. Newman

Attachment

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Via ECFS

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Dear Ms. Dortch:

On December 15 and on December 21, 2006 representatives of McLeodUSA Telecommunications Services, Inc. ("McLeod"), met with the Federal Communications Commission ("Commission") to discuss the ACS of Anchorage Forbearance Petition and memorialized those discussions in written *ex partes* filed with the Secretary. It appears from the written submissions that in the course of these meetings McLeod made several representations regarding the status of competition in the Omaha Metropolitan Statistical Area ("MSA") and specifically regarding Qwest Corporation's ("Qwest") willingness to negotiate with McLeod subsequent to the Commission's grant of Qwest's Petition for Forbearance in the Omaha MSA. McLeod has competed based upon Unbundled Network Elements ("UNE") in Omaha, and appears to be disgruntled because pursuant to the *Omaha Order*,[1] Qwest has asked McLeod to

[1] *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Order*" or "*Omaha Forbearance Order*"), *pets. for review pending sub nom., Qwest Corp. v. FCC*, Nos. 05-1450, *et al.* (D.C. Cir. filed Dec. 12, 2005), *Oral Argument* set for Feb. 6, 2007.

negotiate an alternative to UNE loops and transport in nine wire centers. Qwest takes this opportunity to respond to McLeod's representations regarding negotiations and pricing.

In light of facilities-based competition in the mass market in the Omaha MSA, the Commission granted Qwest forbearance from providing UNE loops and transport at Total Element Long Run Incremental Cost ("TELRIC") prices in nine wire centers ("OFO wire centers").[2] It should be noted that the Commission explicitly did not consider UNE-based competition to support the forbearance grant.[3] Rather, the Commission stated that it was considering only the competition that did not rely on UNEs.[4] That competition includes intermodal facilities-based competition (especially from Cox Communications, Inc. ("Cox")), and the Qwest Platform Plus ("QPP") commercial offering, and resale.[5]

In the *Omaha Forbearance Order* the Commission made clear that in light of the non-UNE competition, particularly in light of Cox's market share, Section 251(c)(3) TELRIC pricing is not necessary to ensure that the Section 10(a) standards are met in the OFO wire centers.[6] The Commission fully expected that Qwest would continue to make wholesale loop and transport facilities available at just and reasonable rates and terms, although not at TELRIC rates.[7] In addition, the Commission expected that Qwest would continue to make special access services available subject to tariff or contract filing requirements.[8]

Consistent with the Commission's predictive judgment, Qwest is not curtailing wholesale access to analog DS0, DS1 and DS3 capacity facilities in the OFO wire centers.[9] Qwest's motivation is to sell as much service as possible, while making a reasonable profit. In order to achieve that goal Qwest has had a number of private line/special access discount plans available for a number of years. Despite the fact that Qwest and McLeod have not yet reached agreement on an amendment reflecting the Omaha forbearance grant, Qwest has been able to reach agreement reflecting that decision with other Competitive Local Exchange Carriers ("CLECs") in the Omaha MSA. Thus, there is no question that Qwest is continuing to make loops and transport available at wholesale in the OFO wire centers, and throughout the Omaha MSA, as required by the Commission.

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[2] *Id.* at 19447 ¶ 64.

[3] *Id.*

[4] *Id.* at 19449-50 ¶ 68.

[5] *Id.* at 19448-49 ¶ 67.

[6] *Id.* at 19467-68 ¶ 105.

[7] *Id.* at 19448-49 ¶ 67.

[8] *Id.* at 19455 ¶ 80.

[9] *Id.* ¶ 79.

Specifically as to McLeod, Qwest actually initiated discussions with McLeod regarding all of its private line purchases from Qwest, which would include McLeod's potential purchases in the OFO wire centers. Qwest shared with McLeod the possible structure of such a deal, and asked McLeod to provide approximate forecasted volumes and revenue in order for Qwest to provide accurate pricing. Although McLeod agreed to provide forecasts of volumes and revenues, in order to negotiate a commercial agreement customized to meet their unique needs, McLeod has yet to provide the data after numerous months. Qwest even suggested a weekly conference call between the parties in order to ensure that the negotiations moved forward. McLeod has simply failed to show up for a number of recent calls.

McLeod had another solution available for some of the OFO wire centers. In addition to Qwest's attempt to negotiate a "global" private line deal, which would include all of the OFO nine wire centers, Qwest after the *Triennial Review Remand Order* ("*TRRO*") ran a promotion specifically to provide CLECs some price relief for high capacity facilities in non-impaired wire centers. Two of the nine Omaha wire centers were on that list. McLeod did not take advantage of that offer.[10] The promotion after the *TRRO* did not generate many sales. Accordingly, Qwest did not run a promotion targeted to the OFO wire centers in response to the *Omaha Forbearance Order* because there was no market-based reason to offer a promotion in a more limited number of central offices, when the larger *TRRO*-related promotion did not generate much response.

In addition to these efforts to provide McLeod with price relief on private line services, Qwest has made repeated requests of McLeod to negotiate an amendment to their Interconnection Agreement to reflect the changes resulting from the forbearance grant. Qwest and McLeod first met several months ago to begin negotiations on what McLeod called a "commercial agreement plan". In good faith and in hopes of reaching a commercial agreement under Qwest's many tariff options, Qwest has continued to allow McLeod to purchase Loop and Transport facilities out of its interconnection agreement in the OFO wire centers.[11] In the meetings with McLeod it has become apparent that McLeod's desire is to develop a contract that will provide TELRIC-like rates for Private Line services that Qwest normally sells out of its FCC Tariff No. 1. Thus, McLeod's complaint that Qwest is not providing just and reasonable

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[10] In fact, McLeod has not signed an amendment reflecting the *Triennial Review Order* and the *Triennial Review Remand Order*, which issued in February 2005, ten months before the *Omaha Forbearance Order*.

[11] Qwest expects to back bill McLeod after the parties reach agreement on a rate for the period after the six month transition ended on March 16, 2006. During the period from November 2005 (just before the December 2005 release of the *Order* granting forbearance) to November 2006, McLeod has actually increased the volume of DS1 Loops and Enhanced Extended Links ("EEL") that it is purchasing from Qwest as UNEs.

pricing under Section 271,[12] is really a complaint that Qwest will not agree to TELRIC pricing. Qwest has made it clear to McLeod that Qwest will no longer offer TELRIC pricing in the OFO wire centers. As can be seen from the examples recounted above, Qwest is prepared to offer McLeod pricing more favorable than the month-to-month rates found in its FCC Tariff No. 1 that McLeod appears to use in its rate comparisons.

Even if Qwest were not offering pricing more favorable than the month-to-month rates found in its FCC Tariff No. 1, McLeod would still be incorrect in arguing that Qwest has failed to offer just and reasonable pricing under Section 271. The *Triennial Review Order* states: "Whether a particular checklist element's rate satisfies the *just and reasonable pricing standard of section 201 and 202* is a fact-specific inquiry that the Commission will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6). We note, however, that for a given purchasing carrier, a BOC might satisfy this standard by demonstrating that *the rate for a section 271 network element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff*, to the extent such analogues exist. Alternatively, a BOC might demonstrate that *the rate at which it offers a section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate.*"[13]

Qwest can meet each of these standards. The rates that it is offering to McLeod are at or below the rates in its interstate access tariff for the comparable special access services. Secondly, Qwest has entered into arms-length agreements with other CLECs to provide the elements at the rates it is offering to McLeod. McLeod is simply incorrect when it accuses Qwest of failing to offer just and reasonable pricing for Section 271 network elements.

In sum, McLeod is incorrect in suggesting that Qwest is not meeting the Commission's expectations in the wake of the *Omaha Forbearance Order*. In fact, Qwest initiated conversations with McLeod in order to try to negotiate pricing on private line services that meet the business needs of both Qwest and McLeod. In addition, McLeod did not take up Qwest's

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[12] *See* Letter to Marlene H. Dortch, Federal Communications Commission from Patrick J. Donovan, Bingham McCutchen LLP, counsel for McLeod, WC Docket No. 04-223, dated Dec. 19, 2006.

[13] *See In the Matter of* Review *of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17389 ¶ 664 (2003), *corrected by Triennial Review Order Errata,* 18 FCC Rcd at 19020, *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

TRRO-related offer of favorable pricing in two of the OFO wire centers. Finally, as a legal matter, Qwest's offers to McLeod are reasonable because they comply with the standard that the Commission has set forth for judging whether pricing for Section 271 network elements is just and reasonable.

Respectfully submitted,

/s/ Daphne E. Butler